Supreme Court, U.S.
FILED
AUG 7 1980
MICHAEL RODAK, JR., CLERK

CASE NO. 80-200

in the

Supreme Court of the United States

October Term, 1979

CHASE MORSEY, JR.,

Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

August 7, 1980

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER FACT QUESTIONS NECESSARY TO DETERMINE THE EXISTENCE OF A SECURITY ARE FOR THE JURY

II.

WHERE THE PROMOTER PROMISED TO MANAGE INCOME STREAMS AND TO USE HIS EXPERTISE, REPUTATION, AND MARKET POSITION TO SELL THE LAND AT A PROFIT, WHETHER A PARTICIPATION IN A LAND SYNDICATION IS A SECURITY

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JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed without opinion on April 11, 1980, and denied rehearing on May 9, 1980.

Jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

REPORTS OF OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit affirmed without opinion. *Morsey v. Green*, 615 F.2d 917 (5th Cir. 1980). The opinion of the United States District Court, Southern District of Florida, is unreported.

STATUTES INVOLVED

The Securities Act of 1933 §2(1), 15 U.S.C. §77b(1) (1976):

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The Securities Act of 1933 §5(a), 15 U.S.C. §77e(a) (1976):

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any

means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

The Securities Act of 1933 §12, 15 U.S.C. §77*l* (1976):

Civil liabilities arising in connection with prospectuses and communications
Any person who —

(1) offers or sells a security in violation of section 5, or

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the

consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

The Securities Act of 1933 §17(a), 15 U.S.C. §77q(a) (1976):

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The Securities Exchange Act of 1934 §3(a)(10), 15 U.S.C. §78c(a)(10) (1976):

> The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

The Securities Act of 1933 §15, 15 U.S.C. §770 (1976):

> *Liability of controlling persons*
> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under

section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

The Securities Exchange Act of 1934 §10, 15 U.S.C. §78j (1976):

Manipulative and deceptive devices
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as

the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

United States Constitution Amend. VII:

Trial by jury in civil cases.
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Proceedings Below

Petitioner, Chase Morsey, Jr. ("Morsey"), sued Respondents, Elmer G. Green ("Green") and First National Bank in Palm Beach (the "Bank"), for the sale of unregistered securities and for deceptive acts and practices in violation of federal securities law.

Green and the Bank moved to dismiss for lack of subject matter jurisdiction. The district court, without receiving evidence, granted the motion, holding that, on the face of the complaint, Morsey's investment was not a security.

Then the district court granted Morsey's motion for rehearing. However, in spite of Morsey's timely jury demand, the district judge received evidence (purportedly under Fed.R.Civ.P. 42), entered findings of fact and conclusions of law, and adhered to the earlier dismissal.[1]

The Fifth Circuit affirmed without opinion.[2]

Statement of the Facts

The suit arose from Morsey's purchase of a 20% participation in a real estate syndicate.[3]

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[1]App. pp. 28-32. The case proceeded to trial on Morsey's pendent state claims.

[2]App. p. 33.

[3]App. p. 29 ¶9.

Morsey disputes much of the district court's fact findings, as well as the court's right to make them.

However, the district court correctly found that Green proposed the purchase of a 16,000 acre operating ranch, in undivided shares, through a land title trust managed by the Bank. with a plan for a quick profitable resale.[4] And, the court correctly found, Green represented that income streams on the ranch would partially offset mortgage payments,[5] making it feasible for the syndicate to hold the ranch through the requisite capital gains tax period.

Green chose the property, purchased it through a shell corporation, and structured the syndicate.[6] He boasted of his expertise, reputation, and market position as a speculator. He told Morsey that the property could be developed, and could be sold to a developer at a handsome profit.

Green told Morsey he would (and he did) take exclusive control of the investment. The written land title trust agreement (which Morsey did not even see until after he parted with his money) purported to give Morsey *pro rata* authority to control the syndicate. The district court, relying on that instrument, incorrectly found Morsey himself had substantial control.

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[4]App. p. 29.

[5]App. p. 29 ¶3.

[6]App. p. 29 ¶6.

The district court further found that Morsey's expectation of profit was based on an anticipated rise in value on resale[7] — i.e., capital appreciation rather than operating income. But the income streams were in fact a material part of the investment, and Green promised to manage those income streams, to offset a portion of the mortgage expense. And, in fact, the expectation of a profitable resale was based solely on Green's unique expertise, reputation, and market position. The expectation was, therefore, not based on a rising market. It was based on Green.

[7]App. p. 29 ¶4.

REASONS FOR ALLOWANCE OF THE WRIT

The issues presented go to the heart not only of the fundamental right to a jury trial, but also of the scope of federal securities laws.

Morsey submits that the questions presented should plainly be answered affirmatively. And because of the fundamental importance of these issues and the absence in the case law of express, definitive answers, this Court should grant the writ of certiorari.

I.

WHETHER FACT QUESTIONS NECESSARY TO DETERMINE THE EXISTENCE OF A SECURITY ARE FOR THE JURY

In making the crucial (and disputed) factual determinations necessary to determine whether Morsey's syndicate participation was an "investment contract," the trial judge improperly preempted the jury.[8]

In *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), this Court indicated that factual questions necessary to determine the existence of a security are for the jury. The Court stated that the existence of a security could be proven either by the document itself, or by extraneous circumstances. And, the Court clearly

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[8]The legal determination was necessarily and expressly based on the factual determinations (1) that Morsey shared control of the enterprise and (2) that the expectation of profit was based on market appreciation rather than on Green's entrepreneurial efforts. There was ample evidence for a jury to find otherwise.

indicated the obvious: extraneous circumstances present factual questions (which necessarily are for the jury):

> In some cases it might be done by proving the document itself, which on its face would be a note, a bond, or a share of stock. In others proof must go outside the instrument itself as we do here. Where this proof is offered in a civil action, as here, a preponderance of the evidence will establish the case; if it were offered in a criminal case, it would have to meet the stricter requirement of satisfying the jury beyond reasonable doubt.

320 U.S. at 355.

In *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961), the court held that factual questions necessary for determining the existence of a security were properly for the jury. The district court had instructed the jury that the particular mineral leases were securities. Citing the language quoted above from *Joiner* and the emphasis in *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946), on substance and economic realities, the court reversed:

> By its very nature, it is the peculiar facts of the setting which turns the offer from a mere sale of property into a sale of a security. That means that the trier of fact, here a jury, must determine the issue.

In *Tarvestad v. United States,* 418 F.2d 1043, 1048 (8th Cir. 1969), *cert. denied,* 397 U.S. 935 (1970), the

court affirmed a jury instruction reciting the statutory language to determine the existence of a security:

> Under the circumstances surrounding their sale, we have no difficulty in approving the submission of the question to the jury.

Great Western Bank and Trust v. Kotz, 532 F.2d 1252 (9th Cir. 1976) followed *Joiner* and *Tarvestad.* The district court, on a finding that the promissory note in question was not a security, dismissed the case for lack of subject matter jurisdiction. The court of appeals stated that the dismissal was erroneous, and, noting that the district court had considered evidentiary material, reviewed the dismissal as a defense summary judgment. The court affirmed only by concluding that there was no genuine issue of *fact:*

> Viewing all the evidence in a light most favorable to GWB, we conclude that the promissory note given by Artco bears no economic resemblance to the "securities" defined by the 1933 and 1934 acts.

532 F.2d at 1260.

The court recognized that while "the issue raised is ultimately one of law," 532 F.2d at 1255, unless the standards for summary judgment or directed verdict are met, the factual questions necessary to make that legal determination are for the jury.

In *United States v. Carman,* 577 F.2d 556, 563 (9th Cir. 1978), the court (while reversing on other grounds)

approved a jury verdict finding an investment contract, where the jury instruction was based on the statutory language and on *Howey:*

> Finding that the court's statement of the applicable law was correct and complete, our review becomes limited to the sufficiency of the evidence to support the jury's verdict.

In *Goodman v. Epstein,* 582 F.2d 388 (7th Cir. 1978), the court reversed the trial judge's denial of a directed verdict finding a security. However, the court implicitly recognized that the factual questions can be taken from the jury only on the standards for summary judgment or directed verdict. Noting that the existence of an investment contract "must be determined from the actual facts and circumstances," 582 F.2d at 406, the court held:

> We do not accept defendant's assertion that they raised sufficient factual questions to necessitate the trial judge's sending this issue to the jury. A summary perusal of the evidence adduced at trial reveals no debatable question of the plaintiff's interests meeting all three of the Howey/Forman tests.

582 F.2d at 407.

These decisions all indicate an affirmative answer to the question presented here — i.e., that the factual questions necessary to determine the existence of a security are for the jury. However, in *Ahrens v. American-Canadian Beaver Co.,* 428 F.2d 926, 928 (10th Cir. 1970), the court suggested a contrary rule:

> The nature of the contracts here concerned and the application of the securities acts as the issue here arose before the trial court was a question of law and not of fact. Since the question whether the beaver contracts were "investment contracts" within the acts were submitted to the jury by the trial court, we must reverse.

Morsey submits that the result is clear: the factual questions necessary to determine the existence of a security are for the jury. However, the result in this case itself demonstrates that the case law permits some ambiguity. The district judge here took it upon himself to make factual determinations, in clear derogation of Morsey's fundamental right to a jury trial. *See Beacon Theatres v. Westover,* 359 U.S. 500, 501 (1959):

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

This Court should grant the petition, to clarify the application of *Howey* and its progeny, and to insure the fundamental right to a jury trial.

II.

WHERE THE PROMOTER PROMISED TO MANAGE INCOME STREAMS AND TO USE HIS EXPERTISE, REPUTATION, AND MARKET POSITION TO SELL THE LAND AT A PROFIT, WHETHER A PARTICIPATION IN A LAND SYNDICATION IS A SECURITY

Even apart from the fundamental jury issue, this Court should grant the petition to determine the applicability of the securities laws to land syndications.

Morsey purchased a 20% participation in a syndicate Green formed to purchase, operate, and resell a 16,000 acre operating ranch.

Morsey plainly invested in a common enterprise with the expectation of profits solely from the efforts of others. The district court's contrary conclusion misconstrued the nature of profits and efforts cognizable under *Howey* and its progeny.[9]

The district court in finding no security relied heavily on the fact that the expected profit was principally from a resale of the property.[10] However, in *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 852, this Court stated that "profit" means either

[9]See generally *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975); *Tcherepnin v. Knight,* 389 U.S. 332 (1967); *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946); *SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344 (1943).

[10]App. p. 29 ¶4.

"capital appreciation" or income. *See also Cameron v. Outdoor Resorts of America, Inc.*, 608 F.2d 187, *modified on other grounds*, 611 F.2d 105 (5th Cir. 1979):

> It is irrelevant that their investment purpose might have been profit from appreciation rather than from rent. 'By profits, the court has meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of the investors' funds . . . .'

But see Happy Investment Group v. Lake World Properties, Inc., 396 F.Supp. 175, 180 (N.D. Cal. 1975) (emphasizing that "at no time *until sale* of the land will plaintiffs realize any actual monetary profit").

The district court's limiting "profits" to income is unwarranted and is contrary to *Forman*.

The district court also relied on the fact that Green did not propose physically to develop the property.[11] Green's promised efforts were to manage the income streams (partially to offset mortgage payments), structure the syndicate, and find a buyer, using his reputation, market position, and expertise. The district court held that these efforts are not cognizable under the securities laws, relying on *Van Arsdale v. Claxton*, 391 F.Supp. 538, 541 (S.D. Cal. 1979):[12]

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[11]App. p. 29 ¶6.

[12]Quoting Loss, Securities Regulation, 491-492 (2d ed. 1961).

> For example, no investment contract is involved when a person invests in real estate, with the hope perhaps of earning a profit as a result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others.

But see Altshuler v. Cohen, 471 F.Supp. 1372, 1380 (S.D. Tex. 1979)[13] and *Bartels v. Algonquin Properties Ltd.,* 471 F.Supp. 1132 (D. Vt. 1979) (holding interests in speculative real estate ventures to be securities, notwithstanding the absence of any physical development).

The district court's limiting cognizable efforts in real estate syndications to physical development is unwarranted. Morsey did not invest in a piece of real estate. He invested in Green. Green structured this deal and told Morsey that he would manage the income and find a quick buyer — not because of any inherent value in the property, but because, as he boasted to Morsey,

[13]"Although the plaintiffs were primarily dependent for success upon economic trends, it is also true that they were primarily passive, and were to some degree dependent upon management skills of the syndicators. Investors in any enterprise, are, to varying degrees, subject to economic trends and the success of their investment is dependent upon, in part, economic trends. It was not contemplated that plaintiffs themselves would actively participate in the management of the affairs of the venture. Plaintiffs invested for the purpose of creating profits through the efforts of the defendant in conjunction with what was hoped to be favorable economic trends. Defendant's skill in marketing the property was a material factor in the success of the enterprise."

he was "Florida's Master Real Estate Sleuth." The fact that Green was master-minding a speculative venture rather than building houses in no way diminishes the crucial importance of his efforts.

Applicability of the securities laws plainly does not depend on "the nature of the assets back of a particular document or offering." *Joiner,* 320 U.S. at 352.[14] A

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[14]Real estate cases commonly turn on issues of control or an investment/consumption dichotomy. See generally, *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946) (sales of orange grove tracts held securities); *Cameron v. Outdoor Resorts of America, Inc.,* 608 F.2d 187, modified on other grounds, 611 F.2d 105 (5th Cir. 1979) (condominium campsite sales held securities); *McCown v. Heidler,* 527 F.2d 204 (10th Cir. 1975) (dismissal of complaint by purchasers of undeveloped lots in real estate development project reversed where purchase depended on promised improvements and purchase price was used for improvements); *Altshuler v. Cohen,* 471 F.Supp. 1372, 1380 (S.D. Tex. 1979) (real estate joint venture, formed for speculation and not for development of tract, held a security); *Bartels v. Algonquin Properties, Ltd.,* 471 F.Supp. 1132 (D. Vt. 1979) (limited partnership interest in speculative real estate venture held a security); *Timmreck v. Munn,* 433 F.Supp. 396, 402-404 (N.D. Ill. 1977) (motion to dismiss security claim denied where plaintiffs purchased lots with expectation of profitable resale based on developers' efforts); *Kroungold v. Treister,* 407 F.Supp. 414 (E.D. Pa. 1975) (limited partnership interest in apartment development held a security); *Sandusky Land, Ltd. v. Uniplan Groups, Inc.,* 400 F.Supp. 440 (N.D. Ohio 1975) (limited partnership in housing development as a security); *Ferland v. Orange Groves of Florida, Inc.,* 377 F.Supp 690 (M.D. Fla. 1974) (orange grove tracts held securities); *SEC v. Lake Mavasu Estates,* 340 F.Supp. 1318 (D. Minn 1972) (purchase of land purchase contracts held a security). But see *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975) (housing cooperative sales held not securities, where primary inducement was consumption, not investment); *Woodward v. Terracor,* 574 F.2d 1023 (10th Cir. 1978)

volatile market and profits deferred until sale are factors normally present in any real estate venture. To hold, as the district court did, that either factor vitiates the significance of profits based on the efforts of others defeats *Howey* and ignores the economic realities of real estate speculation.

This Court should grant the petition, to resolve the meaning of "profits" and "efforts" and to clarify the applicability of the securities laws to real estate investments.

Footnote 14 (Continued)

(lot purchases in residential development held not securities, where prospective improvements were not part of a common enterprise); *Commander's Palace Park Assoc. v. Girard & Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978) (mobile home sale-leaseback held not a security where purchasers retained management control); *Schultz v. Dain Corp.*, 568 F.2d 612 (8th Cir. 1978) (apartment complex investment held not a security where purchaser retained management control); *Owners of "SW 8" Real Estate v. McQuaid*, 513 F.2d 558 (9th Cir. 1975) (shopping center investment held not a security where purchaser retained control of his portion); *Johnson v. Nationwide Industries, Inc.*, 450 F.Supp. 948 (N.D. Ill. 1978) (condominium sales held not securities); *Happy Investment Group v. Lake World Properties, Inc.*, 396 F.Supp. 1975 (N.D. Cal. 1975) (capital appreciation held insufficient to establish expectation of "profit"); *Oxford Finance Co. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974) (real estate joint venture held not a security where investors retained management authority).

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. WPB-76-8044-Civ-CA

SECOND AMENDED COMPLAINT FOR RESCISSION UNDER THE SECURITIES LAWS OF FLORIDA AND OF NEW YORK FOUNDED UPON DIVERSITY OF CITIZENSHIP AND FOR RESCISSION UNDER THE FEDERAL SECURITIES LAWS, FOR DAMAGES FOR FRAUD, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, BREACH OF TRUST, LEGAL MALPRACTICE, AND FOR OTHER RELIEF

Plaintiff, Chase Morsey, Jr., sues Elmer G. Green, individually; First National Bank in Palm Beach, a National banking association, individually and as Trustee ("First National"); Gustave T. Broberg, Jr., individually; Phillip H. Reid, individually; Coe, Broberg & Reid, a Florida law partnership; and Legal Negligence Insurer, a foreign insurance company, jointly and severally, and alleges:

JURISDICTION

1. This is an action for rescission under Federal, New York and Florida securities laws, alternatively or cumulatively for damages under such laws or under common law fraud, breach of contract, and breach of trust.

2. Jurisdiction is found on diversity of citizenship and jurisdictional amount, under Title 28 United States Code §1332, as well as on the existence of a question arising under particular Federal statutes [Title 15 United States Code §77a *et seq.*) (the "1933 Act"), the Securities Exchange Act of 1934, as amended (Title 15 United States Code §78a *et seq.*) (the "1934 Act"), the rules and regulations promulgated under the 1933 Act and the 1934 Act (the "Regulations"), the Investment Advisors Act of 1940, as amended (Title 15 United States Code §806 *et seq.*) (the "1940 Act")].

3. As to diversity of citizenship:

(a) Plaintiff, Chase Morsey, Jr., is a citizen of the State of Connecticut, residing in Greenwich, Connecticut.

(b) Defendant Elmer G. ("Ed") Green is a citizen and resident of the State of Florida.

(c) Defendant First National is a national banking association having its principal and only place of business in Palm Beach County, Florida, and is a citizen of the State of Florida.

(d) Defendant Gustave T. Broberg, Jr., is a citizen and resident of the State of Florida.

(e) Defendant Phillip H. Reid is a citizen and resident of the State of Florida.

(f) Defendant Coe, Broberg & Reid is a Florida law partnership with its place of business in Palm Beach

County, Florida, and all of whose partners are citizens and residents of Palm Beach County, Florida.

(g) Legal Negligence Insurer is a foreign insurance company, with its principal place of business not in Florida or in Connecticut.

4. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00) by Morsey as against each Defendant.

5. This Court has *diversity jurisdiction* under Title 28 United States Code §1332.

6. This Court has jurisdiction over the Federal claims stated herein under Section 22 of the 1933 Act and Section 27 of the 1934 Act (Title 15 United States Code §§77v(a) and 78aa), and over the state claims as diversity claims, as well as under the doctrine of pendent jurisdiction.

FACTUAL BACKGROUND

7. Green represented himself to Morsey and other investors in the Magnolia Ranch as an expert Florida real estate syndicator and manager, having successfully syndicated and managed nearly thirty Florida real estate promotions.

8. On May 18, 1973, Green, while in Florida, telephoned Morsey in New York City and offered Morsey the opportunity to purchase a security interest in a Florida real estate syndication known as the Magnolia Ranch, which Green stated he was organizing and promoting, would operate, manage and resell.

9. Green represented to Morsey that the Magnolia Ranch was located near Orlando, Florida, and contained about 16,000 acres, had a hay-drying operation, was engaged in cattle ranching, the operation of citrus groves, the operation of hunting concessions, and carried on farming and other enterprises primarily under the Terry family. The ranch, said Green, was available for sale at a sacrifice price due to the illness of Mr. Terry, Sr. Among other things, Green represented to Morsey that:

(a) Green had made substantial profits for himself and many other investors in the Central Florida area; he knew the value of the Magnolia Ranch and that it was far in excess of the $755 per acre he was buying it for; that, indeed, the Ranch property was worth some $1100 per acre; and that Green had two prospective investors already interested in the Ranch;

(b) the Magnolia Ranch had been offered many times previously to Green at about $1100 per acre;

(c) the Magnolia Ranch was *an operating property;*

(i) it was a successful farming and ranching operation with sales of sod, cattle grazing and pasturage under a commercial cattle lease, producing citrus groves, and income from hunting leases and concessions;

(ii) the foregoing activities, tended by a number of permanent employees, was producing a net income of some $200,000 a year; this income and other potential and increased income from the operation (grove income to increase 20% per year) would substantially and significantly reduce Morsey's (and the other investors') costs of carrying the investment;

(iii) the commercial cattle grazing lease on the Ranch utilized some 6700 acres of improved pasture as well as some 6000 to 7000 acres of unimproved pasture — 80 to 85% of the Ranch acreage — meant that more than 90% of the Ranch was put to commercial, operational use;

(d) Green had "a plan" to manage the investment for not more than a year and then to sell it for $1150 per acre; Green wrote of his intentions concerning the Ranch: "my plan is to sell in less than one year for about $1,150 per acre." He repeated this in writing on a map.

(e) Green controlled so much land in Central Florida through a multitude of other syndications that Green could effectively make his own market price. To "substantiate" this claim, Green sent to Morsey a copy of an article about Green contained in "The Floridian" Sunday supplement to the *St. Petersburg* (Florida) *Times* for May 13, 1973, a copy of which is annexed and made part of this Second Amended Complaint as Exhibit "A".

10. Green represented to Morsey that he, Green, was forming a syndicate to purchase the Magnolia Ranch, that *he would manage* the Magnolia Ranch for Morsey and other investors, that the profits resulting from Green's management of the Magnolia Ranch would help defray some $200,000 of the yearly carrying costs.

11. Green further represented that the Orlando area, where the Magnolia Ranch was located, was a growing area, that he, Green, was particularly well-acquainted and expert in this area, that as a result of his expertise in operating, managing, and buying and selling such operating properties and his extraordinary reputation and following of investors, that he, Green, had purchasers already available for the Ranch. His most substantial problem, said Green, was to be able to keep from reselling the property before his investors could satisfy the six months' holding period requisite for capital gains treatment.

12. Green further represented that he had successfully managed many other similar syndicates for other investors, was indeed doing so at the present time, that all he required or allowed Morsey, as well as the

other investors, to do was to put up their money, which Green promised, due to the leverage of the investment, to multiply within a year.

13. Green represented to Morsey that he, Green, would take care of full managerial responsibilities for the operation of the Magnolia Ranch, and that the investors should "not bother him" about its management and operation.

14. Green told Morsey that he had other prominent investors to invest in the Magnolia Ranch with Morsey.

15. Green told Morsey that the format he had used in his other real estate syndicates was that of a trust which would hold title to the property, the trustee being First National, and that he, Green, would manage the property for the benefit of all the investors, the investors to receive a security interest in the trust called a "Participation."

16. By letter mailed from Florida, delivered to Morsey at Morsey's office in New York City on May 19, 1973, Green repeated his offer; the letter is annexed and made part of this Second Amended Complaint as Exhibit "B".

17. Green continued to repeat his offer of the Participation in numerous telephone conversations with Morsey during the period May 19, 1973, through the early part of June, 1973.

18. Green represented that Magnolia Ranch could be developed — with golf courses, homes, ranchettes, condominiums and apartments, and that Magnolia Ranch was zoned for such development.

19. The investment syndicate proposed by Green amounted to a common enterprise in which several investors invested their money, the management and hopeful expectation of profits being made for them by Green, who promised effectively to manage and resell the property for Morsey and the other investors.

20. On June 8, 1973, Morsey accepted Green's offer and decided to invest in the Participation offered by Green by depositing in the mail in New York City Morsey's check to Green's order in the amount of $250,000, addressed to Green in Florida. The check was delivered by the U.S. Postal Service, accepted by Green and First National.

21. In connection with the sale of the Participation to Morsey, Green told Morsey that Morsey could and should use Broberg as Morsey's attorney to represent Morsey in connection with the trust to be set up and the acquisition of the Magnolia Ranch. In a meeting set up by Green, Broberg told Morsey that he would, on Morsey's behalf, prepare the documents, that Morsey need not worry about them, that everything would be appropriately and properly documented.

22. Morsey relied upon Broberg's representation that everything was in proper form and that Morsey need not worry about the legal technicalities, since Broberg had taken care of that, and Morsey, relying

upon "his attorney's" advices and assurances, did not, until much later, review any of the documents furnished him.

23. Unknown to Morsey and despite the fact that Broberg had accepted money from Morsey to act as Morsey's attorney, Broberg was operating under a conflict of interest, in that he was actually acting by and for Green (as he had on many other previous occasions in the formation of real estate syndications).

24. The documents which Broberg furnished Morsey contained many provisions which were not to Morsey's best interest, such as a putative forfeiture clause and other provisions which Broberg never explained to Morsey.

25. The Participation was not registered for sale under the Securities Act of 1933, the Florida Blue Sky Laws or the New York Blue Sky Laws.

26. The offer for sale of the Participation was in violation of the 1933 Act, the Florida Blue Sky Laws and the New York Blue Sky Laws.

27. During the course of the communications referred to in the preceding paragraphs, Green failed to disclose numerous facts. The facts not disclosed by Green included, *inter alia,* (a) the size and schedule of the mortgage payments with respect to the real estate; (b) the fact that Morsey would be required to advance substantial funds to the Trust to enable the Trust to meet periodic and recurring mortgage payments and expenses; (c) that there was a provision in the Trust

Agreement whereby, if Morsey failed to make any such payment, Morsey would forfeit his Participation; (d) that Green would receive a substantial real estate commission in connection with the transaction; (e) that there were additional fees and expenses which Morsey would be required to pay over and above the $250,000 purchase price of the Participation in connection with the consummation of the purchase of the real estate, including a substantial legal fee to Broberg; (f) that commercial exploitation of this real estate was highly improbable because almost the entire area was (and still is) zoned for agricultural use only and the Orange County Planning Department had in 1972 officially classified the real estate as "Agriculture" and "Flood Plains."

28. In the latter part of June, 1973, Morsey received numerous documents from Broberg, who was Green's attorney and agent. Broberg requested that Morsey execute and return the Trust Agreement.

29. These documents comprised only a portion of the closing documents (the "Closing Documents") generated in connection with the purchase of the real estate and included a Trust Agreement dated as of June 20, 1973 (the "Trust Agreement") between First National and the beneficiaries named therein.

30. Neither Green nor his agent Broberg disclosed to Morsey the contents of the Closing Documents and particularly the contents of the Trust Agreement. In fact, Green assured Morsey that there was nothing out of the ordinary in the documents.

31. Relying thereon, Morsey executed the Trust Agreement and mailed it in New York City to Broberg in Florida.

32. Green and Broberg's statements contained misstatements of material facts and omitted to state material facts necessary to make their statements not misleading.

33. The representations that Green directly and through his agent and attorney Broberg indirectly made to Morsey were materially false in that, among other things,

(a) the price for the Magnolia Ranch was not favorable; the Ranch property was not worth $1100 per acre;

(b) Green did not have prospective investors ready to purchase the property and in fact, as of the time of this Second Amended Complaint, Green has never found a purchaser for the Magnolia Ranch, and the Ranch is now being foreclosed against Morsey and the other investors in Green's syndication;

(c) Green had no plan and in fact had only briefly visited the area of the Ranch on one occasion subsequent to conceiving the idea of purchasing it;

(d) although Green apparently was involved in many other syndications and therefore was uniquely involved in the market for Central Florida syndications, Green was not able to and did not use his position to

effect an increase in the market price and to find any other purchaser for the property;

(e) although Green did for all of the period of time from Morsey's investment to the commencement of this lawsuit engage in management of the Magnolia Ranch, both directly and indirectly through the sellers of the said Ranch, and among other things, effected an increase in the operating income of one of the portions of the ranch operations, Green was not able to make the Magnolia Ranch operations sufficiently profitable or to sell the Ranch in a sufficiently short period of time to avoid the heavy encumbrances of the federal land bank mortgage or the second mortgage due to the sellers;

(f) contrary to the apparent terms of the Trust Agreement, Morsey and the other investors did not have any voice in the management or have any right to affect or change any decisions being made by Green. By prearrangement and based upon the history of Green's dealing with First National, First National yielded all management decisions to Green and became and was Green's agent to manage the Magnolia Ranch;

(g) Green had no expertise in operation or management of operating properties such as the Magnolia Ranch;

(h) Green had no "plan" for developing Magnolia Ranch with golf courses, homes, ranchettes, and the like, and knew that the appropriate governmental authorities had in fact zoned and planned the area of the Magnolia Ranch as "Agricultural Flood Plains" and did not permit the Terrys or Green to

develop the property in question in accordance with Green's putative "plan."

34. Among the other omissions to state material facts to Morsey, Green failed to disclose to him that:

(a) the zoning history and the true development potential of the Magnolia Ranch contradicted Green's "plan";

(b) Green's prior repeated use and control both of First National and of Broberg as his agents in operating such syndications for all practical purposes as if Morsey and the other investors were limited partners;

(c) neither Broberg nor First National would, nor had they in other syndications in the past, question or dispute any actions by Green with reference to the investment;

(d) Green had committed himself to purchase the Magnolia Ranch real estate before he sold the Participation to Morsey;

(e) Green had an additional pecuniary interest in the promotion of the real estate venture in that he would receive a substantial commission in connection therewith;

(f) further, Green's pecuniary interests in the venture's promotion placed him in a conflict of interest with Morsey;

(g) Green did not disclose this conflict of interest to Morsey prior to selling Morsey the Participation.

35. At the time of the purchase of the Participation, the transmittal, execution and delivery of the Trust Agreement and on numerous occasions thereafter, up to and including August of 1975, Defendants repeated and reaffirmed the misrepresentations referred to above and continued to conceal the omissions referred to above.

36. At the time of the offer for sale and sale of the Participation and at the times of the subsequent misrepresentations and omissions referred to above, Green knew or should have known (a) that the representations made to Morsey were false, and (b) of the existence of the material omissions and Morsey's ignorance thereof.

37. Prior to the purchase of the Participation, Morsey advised Green that Morsey did not have sufficient liquid resources to purchase the Participation and that he would have to borrow the funds from his bank in order to consummate the purchase.

38. Green knew that it was improper and imprudent for Morsey to borrow the funds to purchase the Participation and remained silent.

39. Green made the foregoing misrepresentations and omissions in order to induce Morsey to purchase the Participation and to borrow the funds required.

40. First National knew or should have known of Green's misrepresentations and omissions and failed to inform Morsey thereof.

41. Morsey relied upon the misrepresentations and omissions in purchasing the Participation and borrowing the necessary funds.

42. For some time prior to the offer for sale and sale of the Participation and thereafter, Green cultivated a close personal relationship with Morsey and held himself out to Morsey as an expert in Florida real estate transactions.

43. Green solicitated and obtained Morsey's trust and confidence as an advisor to Morsey in connection with Florida real estate matters. As a consequence, Green placed himself in a fiduciary relationship vis-a-vis Morsey.

44. As a consequence of the aforesaid relationship, Green owed a duty to Morsey of full and fair disclosure concerning the real estate transaction and the Participation.

45. Green breached his duty as Morsey's fiduciary and agent.

46. Additionally, upon information and belief, Green held himself out as an advisor to numerous other individuals with respect to Florida real estate matters and the investment merits of participations similar to Morsey's participation.

47. Upon information and belief, Green was not and is not registered as an "investment advisor" under the 1940 Act or the Florida Blue Sky Laws.

48. First National executed and delivered the Trust Agreement as Trustee for the benefit of Plaintiff and the other beneficiaries named in the Trust Agreement.

49. By virtue of its execution and delivery of the Trust Agreement and its undertaking to Act as Trustee for the beneficiaries named herein, First National entered into a fiduciary relationship vis-a-vis Morsey and the other beneficiaries.

50. First National knew or should have known of the misrepresentations and omissions referred to above and failed to make full and fair disclosure thereof to Morsey.

51. As a consequence, First National breached its fiduciary duties to Morsey.

52. The Trust Agreement provides, in part, as follows: "that in transacting any business relative to the property . . . the Trustee shall be governed and controlled by a majority consent of the Beneficiaries in accordance with his percentage of ownership . . . . ."

53. Upon information and belief, on several occasions during the period June, 1973, through and including the date hereof, First National failed to solicit and obtain the Beneficiaries' consent to various material transactions involving the assets of the Trust and, in

particular, disbursements to Green. Over $100,000 of funds were expended without the investors' approval.

54. First National, contrary to the provisions of the Trust Agreement and in violation of its duties as Trustee, followed Green's directions with respect to the Trust.

55. As Trustee, First National was required to provide Morsey and other beneficiaries of the Trust with regular periodic accountings and with the information necessary to prepare their tax returns on a timely basis.

56. First National failed to do so. In the Spring of 1974, First National failed to provide Morsey with the information required for his tax return in a timely fashion and stated to Morsey that it had been instructed by its accountant to withhold such information.

57. The withholding of such information was in furtherance of Green's scheme to violate the 1933 Act, the 1934 Act, the Florida Blue Sky Laws and the New York Blue Sky Laws and to defraud Morsey.

58. In 1975, when Morsey advised Green that he could not continue to advance funds to the Trust, Green assured Morsey that he would not lose the Participation.

59. Green had previously advised, represented and promised to Morsey that Morsey could not and would not lose his Participation and, in this regard, caused Broberg to send Morsey papers showing that Green and Green's wife had in fact entered into a guarantee of the payment of the second mortgage to the Terrys. By so doing, in addition to his other obligations

to Morsey, Green entered into a contract of which Morsey was the third party beneficiary. Green has subsequently failed to honor that guarantee, breaching his contractual as well as his disclosure duties to Plaintiff, for he had represented in the delivery of the article annexed to this Second Amended Complaint that he, Green, had assets in excess of $50 million.

60. In July, 1975, Green, through his agent Broberg, sought to obtain Morsey's agreement to relinquish all of Morsey's right, title and interest in and to the Participation.

61. In connection therewith, Green failed to make full and fair disclosure to Morsey of all of the facts and circumstances relevant thereto.

62. Green's efforts to induce Morsey to relinquish his interest in the Participation were wrongful and were made with the intent to further defraud Morsey.

63. The solicitation of Morsey's consent to relinquish his interest in the Participation was made in violation of the 1933 Act, the 1934 Act, the Florida Blue Sky Laws and the New York Blue Sky Laws, and constituted a continuing attempt to cover up the prior misstatements and omissions to make statements to Morsey.

FACTUAL BACKGROUND WITH REFERENCE TO BROBERG

64. As part and parcel of the series of transactions described above, Broberg, Reid, and Coe, Broberg & Reid undertook to provide competent legal services in a manner commensurate with the standards of legal practice in the community or in like communities on behalf of Morsey.

65. Specifically, Broberg, on behalf of himself and of the defendant partnership and its partners, undertook to represent Morsey in the acquisition of the Magnolia Ranch and sought and received substantial attorneys' fees from Morsey for said undertaking.

66. Contrary to their undertaking and in violation of their contractual duties and their duty of due care under all circumstances, defendant attorneys breached their contract of representation and failed to perform their undertaking with the requisite due care and/or in the alternative, committed gross negligence in their representation of Morsey, initially and throughout the course of the still on-going transaction.

67. As a result of their said breach of contract, negligence and/or gross negligence, defendant attorneys, jointly and severally, caused Morsey to suffer damages in amounts in excess of $500,000.

68. In addition thereto, defendant attorneys' activities caused Morsey to be required to expend sums of money for attorneys' fees and costs.

69. Defendant attorneys are therefore jointly and severally liable to Morsey for compensatory damages in excess of $500,000, for punitive damages for their gross negligence, and for attorneys' fees, pre-judgment interest and costs.

COUNT I

CLAIM AGAINST GREEN, FIRST NATIONAL AND BROBERG FOR VIOLATION OF SECURITIES LAWS

70. Plaintiff realleges Paragraphs 1 through 69, inclusive.

71. The Participations were "securities" and were not registered.

72. The actions of Green, First National, and Broberg were fraudulent and deceptive.

73. Green offered the investment to an unknown number of investors in New York, Florida, Illinois and Minnesota.

74. The actions of Green, First National, and Broberg constituted violations of the Federal, New York, and Florida securities laws.

75. Morsey was damaged thereby.

COUNT II

CLAIM AGAINST GREEN, FIRST NATIONAL, BROBERG, REID, AND COE, BROBERG & REID FOR VIOLATION OF FLORIDA STATUTES §§517.21(1)

76. Plaintiff realleges Paragraphs 1 through 69, inclusive.

77. First National, Broberg, Reid, and Coe, Broberg & Reid, were agents of and for Green and personally participated and aided and abetted Green in making the sale of the Participation to Morsey and perpetrating this scheme to defraud Morsey and the other investors, all in violation of Florida Statutes Chapter 517.

78. Morsey was damaged thereby.

COUNT III

CLAIM AGAINST GREEN FOR VIOLATION OF 1940 ACT

79. Plaintiff realleges Paragraphs 1 through 69, inclusive.

80. Green was not a registered investment advisor under the 1940 Act.

81. Green's actions therefore violated the 1940 Act.

82. Morsey was damaged thereby.

COUNT IV

CLAIM AGAINST GREEN, FIRST NATIONAL, BROBERG, REID, AND COE, BROBERG & REID, FOR FRAUD

83. Plaintiff realleges Paragraphs 1 through 69, inclusive.

84. Defendants Green, First National, Broberg, Reid, and Coe, Broberg & Reid, were therefore guilty of fraud against Morsey under the securities laws and under common law.

85. Morsey was damaged thereby.

COUNT V

CLAIM AGAINST GREEN AND FIRST NATIONAL FOR BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT

86. Plaintiff realleges Paragraphs 1 through 69, inclusive.

87. Defendants Green and First National therefore violated their fiduciary duties to Morsey.

88. Morsey was damaged thereby.

COUNT VI

CLAIM AGAINST GREEN FOR BREACH OF REAL ESTATE BROKER'S DUTIES

89. Plaintiff realleges Paragraphs 1 through 69, inclusive.

90. Such conduct violated Green's duties to Morsey as a licensed Florida realtor.

91. Morsey was damaged thereby.

COUNT VII

CLAIM AGAINST BROBERG, REID AND COE, BROBERG & REID FOR BREACH OF DUTY OF LEGAL REPRESENTATION

92. Plaintiff realleges Paragraphs 1 through 69, inclusive.

93. Defendant attorneys' actions fall below the standard of legal care required of attorneys in the community.

94. Morsey was damaged thereby.

COUNT VIII

CLAIM AGAINST LEGAL NEGLIGENCE INSURER AS DIRECT ACTION

95. Plaintiff realleges Paragraphs 1 through 69, inclusive.

96. On information and belief, at all times material to this Second Amended Complaint, defendant attorneys were covered by a contract of liability insurance for matters arising out of incidents such as those set forth above; such insurance company, under *Shingleton v. Bussie,* is a real party in interest in this suit, amenable to a direct action by Morsey in this cause, and upon the discovery of the identity of said insurance company, Morsey will seek to amend to join said insurance company as a party defendant.

WHEREFORE, Plaintiff demands judgment against Defendants and each of them as follows:

A. Rescission of the sale of the Participation and a return of all consideration paid therefor plus interest thereon.

B. Damages in an amount in excess of Five Hundred Thirty Thousand Dollars ($530,000.00), plus interest from December 31, 1975, for the loss sustained by Plaintiff as alleged herein in connection with Plaintiff's purchase of the Participation.

C. Damages in an amount as yet undetermined for such future losses as the evidence may show to have been sustained by Plaintiff after December 31, 1975.

D. Interest on the amounts referred to in Paragraphs A and B above.

E. Punitive damages in the sum of One Million Dollars ($1,000,000.00).

F. The cost and disbursements of this action, including reasonable attorneys' fees.

G. Such other and further relief of an equitable or legal nature, or both, as the Court may deem just and proper.

/s/ Guy B. Bailey, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. WPB 76-8044-Civ-CA

ORDER

THIS CAUSE having come before the Court on motion of defendants to dismiss for lack of subject matter jurisdiction, and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motion is GRANTED. The transactions herein are similar to those in *Gordon v. Green,* et al, WPM 76-8151-8155-Civ-CA, the Order of Dismissal of which is attached. There, this Court ruled that the transactions did not constitute a securities transaction under Federal law (to wit, Section 2(1) of the 1933 Act), thereby divesting the Court of Jurisdiction.

ACCORDINGLY, this cause is dismissed. The state claims averred under the doctrine of pendent jurisdiction are dismissed without prejudice to refiling before a court of competent jurisdiction.

DONE AND ORDERED at Miami, Florida, this 28th day of October, 1976.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

ORDER

Plaintiff's motion for a rehearing is granted. An evidentiary hearing on the question of whether or not a security transaction was involved is set for December 14, 1976, at 8:30 A.M. The Court will enter findings of fact and conclusions of law, and thus the parties should file proposed findings and conclusions.

DONE AND ORDERED at Miami, Florida, this 30th day of November, 1976.

/s/C. Clyde Atkins
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

FINDINGS OF FACTS & CONCLUSIONS OF LAW

RE: Rule 42(b) Hearing on the Issue of Whether A Security was Transacted

THIS MATTER is before the Court on a Rule 42(b) hearing to determine whether or not a securities transaction occurred in the case *sub judice*. Upon reviewing the testimony from the witness Morsey, the exhibits received in evidence (to the extent they are relevant), the parties' extensive memoranda of law, and the relevant authorities, the Court herby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On or about May 18, 1973, defendant Elmer G. Green (hereinafter referred to as "Green") while in Florida telephoned plaintiff, Chasey Morsey, Jr. (hereinafter referred to as "Morsey") in New York City and offered Morsey the opportunity to purchase an interest in certain Florida real estate.

2. At or about the same time, or thereafter, Green represented to Morsey the possibility that the described real estate had certain income-producing assets.

3. Green represented to Morsey the possibility that such income-producing assets on the property could be used to partially offset mortgage payment obligations and other expenses incurred by the purchasers of such property.

4. Green's plan and Morsey's reason for purchasing was the expectation of profit and a rise in its value and resale, and the realization of income generated by on-going business thereon.

5. Pursuant to the trust agreement (defendants' Exhibit 2), Morsey had substantial pro rata control over the operation of said businesses.

6. Green did not make any representations to Morsey that Green will undertake the responsibility of developing the land.

7. Green represented to Morsey that the property would be purchased by The Heminway Corporation and thereafter transferred to a bank, as trustee, under a trust agreement for the purposes of holding title and to provide anonymity for the initial investors who would become beneficiaries under the trust.

8. By letter delivered May 19, 1973, Green provided Morsey with certain financial details of the proposed investment.

9. On June 8, 1973, Morsey accepted Green's offer and mailed to Green in Florida a check payable to Green.

10. During June, 1973, the subject property was purchased in the name of The Heminway Corporation.

11. During June, 1973, Morsey received certain documents from Attorney Gustav Broberg (hereinafter referred to as "Broberg"), that is, closing documents relating to the purchase of the property. In addition, Morsey received a proposed trust agreement between Morsey and others as beneficiaries, and the First National Bank in Palm Beach, as Trustee.

12. Morsey executed the trust agreement (defendants' Exhibit 2) and mailed it to Broberg in Florida.

13. In June, 1973, the subject property was transferred to the Bank, as Trustee.

14. Any resale of the property was governed by the terms of the trust agreement entered into by Morsey, which provided that he and the other investors would be governed by a majority consent of the beneficiaries regarding the sale and the terms under which the sale of the property would be made, and in accordance with their percentage of ownership.

15. As indicated in Findings 5 and 6 *supra*, Morsey was not led to expect profit solely from the efforts of Green or any other third party.

CONCLUSIONS OF LAW

1. An investment contract is, within the meaning of the Securities Act of 1933 (15 U.S.C. §77b(1)) and the Securities Act of 1934 (15 U.S.C. §78c(a)(10)), "a

contract, transaction or scheme whereby (1) a person invests his money (2) in a common enterprise and (3) is led to expect profits (4) solely from the efforts to the promoters or a third party." *SEC v. Howey*, 328 U.S. 293, 298-299 (1946).

2. The "solely" aspect of the fourth prong of the *Howey* test means "[T]hose essential managerial efforts which affect the failure and success of the enterprise." *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973), *accord SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974).

3. Whether a particular investment scheme may be characterized as a securities transaction depends upon the facts and circumstances of each case, and the Court must focus upon the "economic reality" of the transaction. *SEC v. Joiner Corp.*, 320 U.S. 344 (1943). *See also Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967).

4. In determining whether an instrument partakes of the nature of a §2(1) "security," the court must consider "the methods used in selling" the instrument. *Gringer v. State Security Life Insurance Co.*, Slip. Op. No. 75-301, p. 1620, 1623 (5th Cir., Feb. 18, 1977).

5. Morsey's investment and involvement in a joint venture with the expectation he would profit from a rise in the value of the property upon his decision and that of the other beneficiaries to sell or the expectation of profits from on-going business of which he had substantial control did not constitute the acquisition or sale of a security under federal law. *Van-Arsdale v.*

Claxton, 391 F.Supp. 538 (S.D. Cal. 1975); *Oxford Financial Corp., Inc. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974).

6. The sale of an interest in real estate is not a security under the New York Blue Sky Laws. *Reiter v. Greenburg*, 288 N.Y.S. 2d 57 (N.Y. App. 1968; *Maxine Gerard, Inc. v. Fisher*, 314 N.Y.S. 2d 688 (S.Ct. N.Y. 1970).

To the extent that the above Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that the above Conclusions of Law constitute Findings of Fact, they are adopted as such.

The Court will enter an Order in conformance with the foregoing Findings of Fact and Conclusions of Law.

ENTERED at Miami, Florida, this 23rd day of March, 1977.

/s/ C. Clyde Atkins
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1973

CHASE MORSEY, JR.,
Plaintiff-Appellant,

versus

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH, individually and as Trustee u/a dates as of June 20, 1973,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(APRIL 11, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges and THOMAS*, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

*District Judge of the Southern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1973

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

(May 9, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges and DANIEL H. THOMAS*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

*District Judge of the Southern District of Alabama, sitting by designation.